

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of ANNA M. COOK and DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, GA

*Docket No. 99-2539; Submitted on the Record;
Issued October 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant is entitled to a schedule award for permanent impairment of her upper and lower extremities, neck and back; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The Board finds that appellant is not entitled to a schedule award for her upper and lower extremities, neck or back.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,² including that she sustained an injury in the performance of duty as alleged and that her disability, if any, was causally related to the employment injury.³

The schedule award provision of the Act⁴ and its implementing regulations⁵ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁶ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1445 (1989).

⁴ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁵ 20 C.F.R. § 10.304.

⁶ 5 U.S.C. § 8107(c)(19).

determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁷

On May 4, 1997 appellant, then a 62-year-old electronic technician, filed a claim alleging that on April 30, 1997 she sustained bruises and a contusion of both knees and hands, with swelling. Appellant stated that she was walking towards the main door in a front courtyard of the employing establishment when she tripped on an uneven crack in the sidewalk and fell landing on both knees and hands, and right elbow. Appellant stopped work on April 30, 1997 and returned to work on May 14, 1997.⁸

By letter dated September 12, 1997, the Office accepted appellant's claim for a leg and knee sprain. In a November 24, 1997 letter, the Office expanded the acceptance of appellant's claim to include a shoulder, neck and lumbosacral strain.

On January 5, 1998 appellant filed a claim (Form CA-7) for a schedule award.

By decision dated April 16, 1998, the Office found the evidence of record insufficient to establish that any permanent impairment was causally related to the April 30, 1997 employment-related conditions. In an October 30, 1998 letter, appellant requested reconsideration of the Office's decision.

By decision dated December 9, 1998, the Office denied modification of the April 16, 1998 decision. In a January 26, 1999 letter, appellant requested reconsideration of the Office's decision.

In a May 21, 1999 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was of a cumulative nature and insufficient to warrant review of the prior decision.

Dr. Robert Thornsberry, an orthopedic surgeon and appellant's treating physician, submitted a December 15, 1997 medical report. In this report, Dr. Thornsberry indicated that appellant had a zero percent impairment of either lower extremity. Similarly, Dr. Thornsberry submitted a December 18, 1997 medical report finding that appellant had a zero percent impairment of either upper extremity. These reports by appellant's attending physician do not support appellant's claim of permanent impairment to her lower or upper extremities which would entitle her to a schedule award.

Also submitted in support of a permanent impairment was Dr. Thornsberry's undated medical report in which he opined, without rationale, that appellant fell into the category of

⁷ See *James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁸ Appellant retired from the employing establishment in February 1999.

Diagnostically Related Group II which corresponded to a five percent total body disability, based on the fourth edition of the A.M.A., *Guides*. No specific upper or lower extremity impairment rating was provided. Neither the Act nor its implementing regulations provide for a schedule award for impairment to the body as a whole.⁹ Consequently, a five percent whole body impairment is not compensable under the Act. The Board finds that, since Dr. Thornsberry did not give an impairment rating of appellant's lower or upper extremities related to her accepted employment-related conditions, and did not explain upon what he based his determination of permanent impairment, his report does not support appellant's claim for a schedule award.

On April 7, 1998 an Office medical adviser stated that Dr. Thornsberry's whole body rating was related to the lumbar spine. The Office medical adviser stated that the Office's regulations do not permit a rating for the whole body and concluded that appellant had no impairment of either upper or lower extremities.

Appellant submitted Dr. Thornsberry's June 4, 1998 medical note indicating that she had some degenerative changes in her knees, but full motion equal on both sides and no instability. Dr. Thornsberry noted that he would give appellant a two percent disability for pain in her knee. Appellant also submitted Dr. Thornsberry's June 11, 1998 medical report finding that she had an additional two percent impairment of the lower extremity due to weakness, atrophy pain or discomfort. In Dr. Thornsberry's June 24, 1998 medical report, the physician found that she had a five percent permanent impairment of the lower extremity due to loss of function from pain or discomfort. Inasmuch as Dr. Thornsberry did not explain upon what tables in the A.M.A., *Guides* he based his determination of permanent impairment, his reports are of diminished probative value and do not support appellant's claim for a schedule award.

Appellant submitted Dr. Thornsberry's October 25, 1998 report, finding that she had a zero percent impairment of either upper extremity. This report by appellant's attending physician does not support appellant's claim of a permanent impairment.

On December 7, 1998 an Office medical adviser reviewed the medical records, including Dr. Thornsberry's reports, and stated that he agreed with the finding that the only permanent partial impairment was in the back and not in the knees.¹⁰ The Office medical adviser stated that there was no medical documentation regarding knee pain until Dr. Thornsberry's June 4, 1998 note.

A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor the regulations provide for the payment of a schedule award for an impairment to the back.¹¹ Furthermore, the back is

⁹ See *James E. Mills*, 43 ECAB 215 (1991).

¹⁰ A May 20, 1998 functional capacity evaluation found:

"Due to no other diagnostic or clinical evidence of impairment, we concur with the previous impairment rating of five percent whole person. No extremity impairment is noted as normal findings were indicated. Whole person impairment associated with the lumbar spine does not offer an extremity impairment."

¹¹ *George E. Williams*, 44 ECAB 530 (1993).

specifically excluded from the definition of organ under the Act.¹² Therefore, appellant is not entitled to a schedule award for her accepted lumbosacral strain under the Act.

It is appellant's burden to provide medical evidence establishing her entitlement to a schedule award and the medical evidence in this case does not support such entitlement. The Board finds that the Office properly determined that appellant was not entitled to a schedule award under the Act.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that a claimant must: (i) show that the Office erroneously applied or interpreted a point of law; (ii) advance a point of law or a fact not previously considered by the Office; or (iii) submit relevant and pertinent evidence not previously considered by the Office.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁶

In support of her January 26, 1999 request for reconsideration, appellant submitted Dr. Thornsberry's May 6, 1997 treatment notes. Appellant also submitted a December 31, 1998 magnetic resonance imaging (MRI) report of Dr. L. Daniel Strawn, a Board-certified radiologist. Dr. Thornsberry's report and Dr. Strawn's MRI findings are irrelevant to appellant's claim inasmuch as they do not provide any impairment rating in accordance with the A.M.A., *Guides*. Therefore, appellant has not provided any evidence that would warrant reopening the record.

Appellant also submitted Dr. Thornsberry's January 19, 1999 medical report, who concluded that appellant had a total disability of two percent for the lower extremity, five percent of the body for her low back and one percent for her total body based on her knee, which totaled a six percent total permanent disability. This evidence, however, is cumulative in nature to his prior reports. Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted

¹² *James E. Mills*, *supra* note 9; *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

The May 21, 1999 and December 9, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 2, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member